MALAYSIAN REPORTS

V. VEERIAH v. GENERAL MANAGER, KERETAPI TANAH MELAYU

[O.C.J. (Mohamed Azmi J.) January 16, 1974]
[Kuala Lumpur — Civil Suit No. 632 of 1972]

Evidence — Estoppel — Representation made innocently or mistakenly cannot operate as an estoppel — Evidence Act, s. 115.

The plaintiff was an employee of the defendant. From his record of service his date of birth was stated as June 26, 1916. Accordingly he was retired from the service of the defendant pursuant to the Pensions Ordinance on June 26, 1971. The plaintiff sought a declaration that he had been prematurely and unlawfully retired before reaching the age of fifty five and for a declaration that on June 26, 1971 his correct age was fifty one years. The following facts were agreed: the plaintiff was in fact born on June 2, 1921 and not on June 26, 1916. His Identity Card, E.P.F. Membership Card and Citizenship Certificate all showed his date of birth as June 2, 1921. The plaintiff had taken steps to obtain proof that he had in fact been born on June 2, 1921 and to have his date of birth on his service record card altered as permitted by the General Orders governing his employment. The defence contention was that by virtue of section 115 of the Evidence Act the plaintiff was estopped from proving his true date of birth.

Held: (1) the evidence showed that even before the date of intended retirement the defendant already believed or had reason to believe that the plaintiff was not in fact born on June 26, 1916;

(2) for the defendant to succeed on the defence of estoppel, there must be ignorance on his part as to the real date of birth of the plaintiff. When both parties have equal means of knowledge of the fact there can be no estoppel;

(3) there can be no estoppel where the truth of the matter appears as it did in the present case on the face of the proceedings;

(4) (following *Muthiah* v. *Lee Kor Fan*[2]) one of the necessary elements of a valid estoppel by representation is that the representation should be of a nature to induce, i.e. the representation should be made with the intention of inducing the person pleading estoppel to alter his position to his detriment. In this case no evidence had been adduced to prove such intention or from which such intention could be inferred.

Cases referred to:-

(1) *Tara Lal Singh* v. *Sarobur Singh* 27 I.A. 33 @ 38.
(2) *Muthiah* v. *Lee Kor Fan* [1966] 1 M.L.J. 105.

CIVIL SUIT.

R. Ponnudurai for the plaintiff.

Wong Chiong Seng for the defendant.

Mohamed Azmi J.: The plaintiff was at all material times employed by the defendant as a chargeman in the Malayan Railway at Kuala Lipis. From his record of service, he reached the age of fifty-five years on June 26, 1971 and accordingly he was retired from service under the mandatory provision of section 10(a) of the Pensions Ordinance 1951 as from that date. The plaintiff now contended that on the said date he had not in fact reached the age of fifty-five and, therefore, brought the present action for a declaration that he had been prematurely and unlawfully retired before reaching the age of fifty-five, and for a declaration that as on June 26, 1971 his correct age was fifty-one years and that he be reinstated in his employment as from that date. I entered judgment for the plaintiff as prayed and the defendant now appeals against the whole of the said decision.

From the pleadings, it was the contention of the plaintiff that he was in fact born on June 2, 1921, but the defendant averred that from the personal particulars appearing in the service record which the plaintiff had thumb-printed, he stated his date of birth as June 26, 1916 (see Exhibit D1), and as such he was estopped from denying the truth of the date of birth as represented in the records of service. In this case, all the facts had been agreed and the only defence put up by the defendant was one of estoppel under section 115 of the Evidence Act which reads:

"When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, *otherwise than but for that belief he would have acted,* neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representatives in interest to deny the truth of that thing." (The emphasis is mine).

The defence contention was that despite the indisputable fact that the plaintiff was in fact born on June 2, 1921, he was estopped from proving it by virtue of that section. It was argued that since joining the Federated Malay States Railway (as it was then known) some thirty years ago, the plaintiff had all along represented his date of birth as June 26, 1916, and acting on this representation and belief the defendant had notified him on August 12, 1970 of his compulsory retirement under the Pensions Ordinance to take effect from June 25, 1971. It was alleged that not until March 31, 1971, *i.e.* some six months after he had been notified, the plaintiff took action to have his date of birth altered to June 2, 1921. As such, it was argued that, if the claim was allowed, it would be to the detriment of the defendant in terms of money. In short, the defence was that as a result of the representation made by the plaintiff as to his date of birth when he joined the Railway in 1941 and his conduct in not doing anything to rectify the said date till March 31, 1971, the defendant was induced to alter his position to his detriment by serving the plaintiff a notice of retirement on August 12, 1970.

Sarkar on Evidence, Twelfth Edition, at page 1033 states that there are seven prerequisites to bring a case within the scope of estoppel as defined in section 115. It was contended by the defence that all these prerequisites had been fulfilled, namely: —

(1) There must be a representation by a person or his authorised agent to another in any form — a declaration, act or omission.

(2) The representation must have been of the existence of a fact and not of promises de futuro or intention which might or might not be enforceable in contract.

(3) The representation must have meant to be relied upon, *i.e.* it must have been made under the circumstances which amounted to an intention causing or permitting belief in another. The proof of the intent might be direct or circumstantial, *e.g.* by conduct.

(4) There must have been belief on the part of the other party in its truth.

(5) There must have been action on the faith of that declaration, act or omission, that is to say, the declaration, act or omission must have actually caused another to act on the faith of it, and to alter his former position to his prejudice or detriment.

(6) The misrepresentation or conduct or negligence must have been the proximate cause of leading the other party to act to his prejudice.

(7) The person claiming the benefit of an estoppel must show that he was not aware of the true state of things. If he was aware of the real state of things or had means of knowledge, there can be no estoppel.

Thus, for the defendant to succeed on the defence of estoppel, there must be ignorance on his part as to the real date of birth of the plaintiff. He must show that he was ignorant of the truth regarding the representation, but when both parties have equal means of knowledge of the fact, which in the present case was the plaintiff's date of birth, there can be no estoppel. Further, in my judgment, there can be no estoppel where the truth of the matter appears, as it did in the present case, on the face of the proceedings. (See judgment of Lord Davey in *Tara Lal Singh* v. *Sarobur Singh*[1]). To my mind, this is a sound authority since estoppel is based on equity and good conscience with the object of preventing fraud and to secure justice between parties by promotion of honesty and good faith. From the agreed facts, it was common ground that the plaintiff was born on June 2, 1921 and not on June 26, 1916. His present Identity Card, E.P.F. Membership Card and Citizenship Certificate all showed his date of birth as 1921 and not 1916. In fact, at the outset of the hearing, learned counsel for the defendant conceded that the plaintiff was born on June 2, 1921. Under the circumstances, there could be no estoppel arising out of this action when the truth of the plaintiff's date of birth appeared on the face of the proceedings and, as such, the plaintiff should not be estopped from denying his date of birth as June 26, 1916.

Further, it is relevant to note that learned counsel for the defendant conceded that in some cases employees of the Malayan Railway had on their application been allowed by the Public Services Department to alter their date of birth, but the plaintiff's application to do so dated March 31, 1971 was refused on the ground that it was not sent through the proper channel. This discretionary power of the Public Services Department to alter date of birth in genuine cases appeared to have been exercised under the provision of General Orders Cap. A 19(e). The plaintiff's second application through the proper channel dated July 12, 1971 (Exhibit AB11) was, however, turned down. It is not at all clear why it was turned down when there was ample proof that the plaintiff's date of birth as contained in the record of service was clearly erroneous. The defendant, therefore, had not fulfilled the seventh prerequisite since it was aware of the real state of affairs or had means of knowledge of the plaintiff's real date of birth before the compulsory retirement came into effect. It should be noted that although the retirement notice (Exhibit AB5) sent by the Locomotive Superintendent was dated August 12, 1970 and the defendant was officially informed that the date of birth was wrong only on March 31, 1971 (see Exhibit AB7) *i.e.* some seven months after the date of notification but some three months before the date of compulsory retirement, the plaintiff had already taken action to discover his true date of birth on March 18, 1970, *i.e.* about seventeen months prior to the date of notification, by writing to the Indian High Commission in Kuala Lumpur. (See Exhibit AB2). Taking into consideration the defendant's practice in allowing his employees to alter their date of birth in genuine cases, it seems natural for the plaintiff in wanting to obtain all necessary documentary evidence first before informing the defendant about the mistake in the date of birth in the record of service. The fact that the defendant had by letter dated May 28, 1971 (Exhibit AB8) requested the production of the four vital documents for purposes of considering the plaintiff's application, showed that even before the date of intended retirement, the defendant already believed or had reason to belief that the plaintiff was not in fact born on June 26, 1916. It is difficult to fathom why the plaintiff's application was turned down when other Government agencies, such as the Registration Department in charge of Identity Cards and Citizenship, and as well as the Employees Provident Fund Board, had already accepted the date of birth of the plaintiff as June 2, 1921. Accordingly, the defence counsel's insinuation that the plaintiff only took action at the twelfth hour to have his birth date altered was unwarranted. The fact that the plaintiff took action through the Indian High Commission Office in Kuala Lumpur about seventeen months prior to the date of notification speaks for itself. The fact that the defendant had served the plaintiff a notice of retirement on August 12, 1970 could not by itself be sufficient to constitute a right which, if postponed, could be described as altering his position to his prejudice or detriment. It was argued that if the plaintiff's claim was allowed it would be to the detriment of the defendant in terms of money, but no such evidence had been adduced. Further, there was no evidence adduced to suggest that the plaintiff was a bad employee or that his continued employment in the Railway would be to the prejudice and detriment of the defendant.

In this case, there could be no doubt that the representation as to the date of birth in the record of service was made innocently and mistakenly. There was also no suggestion that the representation was made to mislead the then F.M.S. Railway and that acting on this representation the defendant was misled in giving the plaintiff a job as a temporary fitter on February 19, 1941. It is true that Sarkar on Evidence, Twelfth Edition, at page 1033 states that it is not necessary that there should be a design to mislead, or any fraudulent intention or that the representation should be false to the knowledge of the maker. It is said that representation even when made innocently or mistakenly may operate as an estoppel. But in my view, there is a vital distinction between section 115 of the Indian Evidence Ordinance and our own section. The words "otherwise than but for that belief he would have acted" are not to be found in the Indian section. I agree with the decision of MacIntyre J. (as he then was) in *Muthiah* v. *Lee Kor Fan*[2] that one of the

necessary elements of a valid estoppel by representation is that the representation should be of a nature to induce, *i.e.* the representation should be made with the intention of inducing the person pleading estoppel to alter his position to his detriment. The onus of proving estoppel being on the defendant in this case, no evidence had been adduced to prove such intention or from which such intention could be inferred. Thus, although learned counsel for the defendant contended that as a result of the alleged continuous representation the defendant had acted on it by giving notice of retirement on August 12, 1970, there was no evidence that the plaintiff had by the said representation intentionally induced the defendant to act in such manner. On the contrary, by communicating with the Indian High Commission on March 18, 1970, it could reasonably be inferred that the plaintiff had every intention to prevent the defendant from sending the notice of retirement. Unlike in India, a representation made innocently or mistakenly cannot operate as an estoppel unless it was made with the intention of inducing the party pleading the estoppel to alter his position to his prejudice or detriment.

For the above reasons, the defence of estoppel must fail. Accordingly, I entered judgment for the plaintiff in terms of prayers (i), (ii) and (iii)(a) and costs.

Judgment for the plaintiff.

Solicitors: *Rajendra & Teik Ee; Zain & Co.*

CHEONG BEE v. CHINA INSURANCE CO. LTD.

[O.C.J. (Hashim Yeop A. Sani J.) March 18, 1974]
[Seremban — Civil Suit No. 215 of 1970]

Motor Insurance — Policy, construction of — Whether risk intended to be covered by policy — Road Traffic Ordinance, 1958, s. 79.

The plaintiff claimed from the defendant insurance company payment towards a judgment sum entered in favour of the plaintiff against one Abdul Rani bin Sasat the insured party. It was agreed that the accident giving rise to the judgment sum occurred during the currency of the policy so the sole point at issue was whether the risk was a risk covered by the policy because at the time of the accident Abdul Rani was in possession of an expired provisional driving licence and he was driving the insured vehicle without being under the supervision of a competent driver.

At the time of the accident, section 79 of the Road Traffic Ordinance 1958 had not been amended to include sub-paragraphs (i), (j) and (k) which were inserted in the Ordinance by Act 21 of 1967.

A clause within the policy described "the Authorised Driver" (a) as being the policy holder and (b) any other person who is driving on the policy holder's order or with his permission. The proviso to this clause states that the person driving should be permitted in accordance with the licensing or other laws to drive a motor vehicle or has been so permitted and is not disqualified by order of a court of law or by reason of any enactment in that behalf from driving the motor vehicle.

Held: upon a consideration of the policy the proviso could only apply to both limbs of the clause i.e. to the policy holder as well as to any other person driving with his permission or upon his order. The risk was therefore not covered by the policy and the claim failed.

Cases referred to:-

(1) *Tan Kwang Chin* v. *Public Prosecutor* [1959] M.L.J. 253.

(2) *Edwards* v. *Griffiths* [1953] 1 W.L.R. 1199, 1203.

CIVIL SUIT.

N. Ramachandran for the plaintiff.

Khoo Eng Chin for the defendant.

Hashim Yeop A. Sani J.: This is a suit wherein the plaintiff is claiming from the defendant insurance company for the payment towards the judgment sum of $6,600 entered on 30th October, 1970 in favour of the plaintiff against one Abdul Rani bin Sasat. It is not disputed that policy of insurance No. 416974 dated 11th November, 1965 was issued by the defendant insurance company to the said Abdul Rani bin Sasat, owner of motor vehicle No. NA 4745, to cover the use of the said vehicle against third party risks for period between 1st November, 1965 to 31st October, 1966. The accident in question occurred on 11th November, 1965.

It is the contention of the plaintiff that the accident in respect of which the said judgment was obtained occurred during the currency of the policy and the risk was the risk intended to be covered by the said policy.

The defendant company agrees that the accident occurred during the currency of the policy but disputes that the risk was a risk covered by the said policy on the grounds that at the time of the accident the said Abdul Rani bin Sasat was in possession of an expired provisional driving licence and he was driving the said vehicle without being under the supervision of a competent driver. Counsel for both parties at the commencement of the hearing agreed to rest only on their submissions and the agreed facts and no witness was called.

At the outset it must be noted that at the time of the accident *i.e.* 11th November, 1965 section 79 of the Road Traffic Ordinance, 1958 was not yet amended to include the additional sub-paragraphs (i), (j) and (k) which were inserted by Act 21 of 1967. That Act came into force on 15th January, 1968. At the material time therefore section 79 of the Ordinance merely provided that where a certificate of insurance has been delivered under that Ordinance to the person by whom a policy has been effected so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to the matters specified in paragraphs (a) to (h) inclusive shall as respects such liabilities as required to be covered be of no effect and these did not include the new sub-paragraph (j) relating to the driver of the motor vehicle at the time of the accident not holding a licence to drive or not holding a licence to drive the particular motor vehicle. The sole question to be decided is whether the accident on 11th November, 1965 was a risk intended to be covered by the policy. The answer must therefore be based solely on the construction of the policy of insurance and the related document, to wit, the proposal form — (Pages 1 and 2 in Agreed Bundle of Documents.)

Counsel for both parties cited a number of judgments but the judgments cited were those of criminal proceedings relating to driving motor vehicles without being covered by third party risks insurance under the Road Traffic Ordinance, 1958.